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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1991

ROBERT L. HAMILTON,

Petitioner,

vs.

AIR JAMAICA, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the employer's summary plan description meet the disclosure and accuracy requirements of the Employee Retirement Income Security Act of 1974 where the plan describes numerous benefits in lengthy detail, followed by a brief reservation of rights clause, allowing the employer to change benefits on a case by case basis at any time.

2. Are the statutory requirements of the Employee Retirement Income Security Act of 1974 that an employer's plan set forth circumstances under which benefits will be denied and procedures for modifying benefit plans satisfied by the employer's reservation of rights clause which allows denial of benefits on a case by case basis at any time.

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No.

In The

Supreme Court of the United States

October Term, 1991

ROBERT L. HAMILTON,

Petitioner,

vs.

AIR JAMAICA, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Robert L. Hamilton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-captioned matter on September 30, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 945 F.2d 74 and is reprinted in the appendix at 1a.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 750 F. Supp. 1259 and is reprinted in the appendix at 14a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 30, 1991, reversing the judgment of the United States District Court for the Eastern District of Pennsylvania entered on November 2, 1990, in favor of petitioner-employee on the severance pay claim. The United States Court of Appeals for the Third Circuit denied a timely petition for rehearing on October 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1001(b)

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal Courts.

29 U.S.C. § 1022(a)(1)

A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the

average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section should be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

29 U.S.C. § 1022(b)

The plan description and summary plan document shall contain the following information: The name and type of administration of the plan; the name and address of the person designed as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C. § 1102(b)(3)

Every employee benefit plan shall provide a procedure for

amending such plan, and for identifying the persons who have authority to amend the plan, and . . .

STATEMENT OF THE CASE

The petitioner Robert L. Hamilton worked as an account executive for the respondent airline. After a twelve-year long career of serving his company, Mr. Hamilton's employment was terminated.

During his employment, the employee was given an attractive benefits notebook by the employer, titled "Employee Handbook". It described a severance pay benefit which was calculated in a certain method, based on length of service. After Mr. Hamilton departed, he was paid a severance pay benefit. However, he noticed that the amount of his separation pay benefit was in error, based on the notebook formula. The employer's director of industrial relations advised that the notebook was in error, and that Robert L. Hamilton was paid pursuant to an unwritten company policy. A memorandum was issued to correct the mistake, within a day of the employee's separation.

Notwithstanding the memorandum, which Mr. Hamilton received after he was notified of termination, the benefit to which he looked forward was clearly described in the impressive employee benefits notebook. The three-ring binder held dozens of pages of wonderful benefit descriptions ranging the gamut of non-salary compensation.

After the various benefits were described, the employer concluded the document with a one-page policy statement that set out a one-sentence reservation of rights, whereby the employer stated that it retained the power to do whatever it wanted with pay practices and benefits by way of changing the benefit or denying it. While the employee, Robert L. Hamilton,

acknowledged the existence of this page, he did not like the tone of the language, and refused to sign his agreeability with that employer power, at the signature line on that page.

The rest of the book, though, was inconsistent with that clause, appearing colorful in form and generous in text. The large format notebook displayed Air Jamaica's corporate colors, orange and yellow. It flowed logically, from benefit description to benefit description, all neatly separated by oversize-page dividers. The benefits ranged from medical, dental and visual to life insurance and disability coverage. These lush benefit descriptions were rich in detail, implying a significant corporate transfer to the staff.

The severance pay benefit, itself, appeared in a potpourri section which included descriptions of a variety of less detailed benefits, including vacation time and overtime. A formula was provided whereby an employee could easily calculate his severance pay benefit, by deciding first what his employment status was, then selecting the appropriate multiplier and then multiplying by the number of years served. Mr. Hamilton relied on this written statement of his benefit.

Suit commenced. The jurisdiction of the United States District Court for the Eastern District of Pennsylvania was invoked under 28 U.S.A. § 1331, 29 U.S.C. § 1132(f) and the principles of pendent jurisdiction. After suit was brought to seek complete payment of the separation benefit, the respondent-employer defended on a theory that the reservation of rights clause gave it the right to change a benefit payment unilaterally, whenever it wanted. The trial court entered judgment in favor of petitioner, on the severance pay claim. The district court held that the notebook was a summary plan description and that the severance pay described therein, though erroneous, was paramount to the unwritten corporate policy.

The district court also held that while an employer may amend welfare benefit plans, the change that took place with the correction memorandum was untimely.

On appeal, the appeals court held that the reservation of rights clause was valid and was part of the substantive benefit plan. The court rationalized its decision on the premise that welfare benefits are not required in the context of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 *et seq.*

REASONS FOR GRANTING THE WRIT

I

WHERE THE EMPLOYER PROVIDES A SUMMARY PLAN DESCRIPTION THAT IS CONTRADICTORY AND SELF-DEFEATING, AS A RESULT OF A RESERVATION OF RIGHTS CLAUSE, THE PLAN IS IRRECONCILABLE WITH THE STRICT STATUTORY REQUIREMENTS OF DISCLOSURE AND ACCURACY.

The appeals court decision left unanswered an important question: once a benefit plan is described and a specific benefit is offered, how is the reservation of rights reconciled with strict ERISA provisions for disclosure and accuracy. The appeals court held that nothing in ERISA prevents the denial of benefits on a case by case method. Petitioner-employee respectfully disagrees, arguing that the reservation of rights cannot be reconciled with the statute and that the statute calls for more certainty and predictability.

Petitioner's suggested answer to that question does not attempt to equate welfare benefits with pensions benefits (they are not the same) or disallow an employer to change a benefit plan (it can). The rule of law which will resolve this issue, though,

should restore the meaning of "disclosure" and "accuracy," and square the facts of this case with statutory requirements. Two ERISA provisions apply and control.

The incongruous summary plan description, with the lengthy benefit descriptions and the short, bittersweet disclaimer, has to fit within the disclosure requirements, first of all. If a benefit package is offered, there must be a writing to record the nature and terms of the benefit. 29 U.S.C. § 1001(b). Further, the employee must be furnished with a summary plan description. 29 U.S.C. § 1022(a)(1). If the employer has a right to give or deny a benefit, based on the reservation of rights, the practical effect of this Air Jamaica, Ltd. ("Air Jamaica") notebook is that nothing is disclosed. The plan description is nonsense, adding nothing to the employee's knowledge. Since there may be a benefit or they may not be a benefit, when the benefit plan is applied case by case, there is in actuality no disclosure.

An alternative exists, if the employer wants the final say; it need only issue the last page of the notebook. That sort of revelation is a disclosure, as the employee is not receiving mixed messages. It is indeed well-settled that Air Jamaca need not offer a benefit package nor provide severance pay, as a specific benefit. Yet, once that particular plan is embodied in the book, and that specific pay practice is written, the statutory provisions apply. The Air Jamaica book does not disclose what to expect, though, and for that reason it falls short of ERISA requirements.

Secondly, there are strict statutory provisions holding the employer's summary plan description to a standard of accuracy. 29 U.S.C. § 1022(a)(1). The severance pay formula and all the other benefits have an appearance of accuracy. Yet, when those benefits can be taken away, whenever and however, the accuracy

is deficient. Accuracy should provide certainty, stability and predictability. Accuracy insures precision. The application of a benefit plan according to a reservation of rights clause, however, is anything but predictable. It is random and varied.

An accurate plan would let the employee know where he stands, but the Air Jamaica plan does not. Reading it completely, acknowledging the gift of benefit and the possible deprivation of same, leads to confusion, as the employee questions, "Do I have a benefit?" or "Don't I?" This ambiguous, contradictory plan fails to confirm to ERISA's accuracy requirements.

II.

THE RESERVATION OF RIGHTS CLAUSE WHICH ALLOWS AMENDMENT OF BENEFITS ON A CASE BY CASE BASIS, WHENEVER, FAILS TO CONFORM TO THE STATUTORY REQUIREMENT THAT THE BENEFIT PLAN SET FORTH CIRCUMSTANCES UNDER WHICH BENEFITS WILL BE DENIED AND PROVIDE PROCEDURES FOR AMENDMENT.

Other statutory requirements have to be met by the employer, on the facts of this case, and, those, too, are not satisfied. Where an employer desires the right to amend its plan, ERISA requires that the employer set forth the procedures for doing so. 29 U.S.C. § 1102(b)(3). While the reservation of rights clause may be a proper mechanism for retaining the right to change, as held by the trial court, it is not enough to merely state that much. The procedures for implementing change must be set out, too. Air Jamaica's one-page disclaimer is inadequate, though.

The amendment power contained in the disclaimer is cataclysmic; a benefit can be drastically altered or denied at a significant moment, such as the time of termination. The statutory

framework, however, imposes a methodology for change. The orderly change directed by ERISA is not consistent with Air Jamaica's case by case treatment, as the employee has no prior notice, no time for reaction and no smooth transition to the amended benefit plan. This flaw is a further ground for invalidating the employer's reservation of rights clause.

Finally, the strict notice provisions of ERISA also allow the employee to be advised of circumstances under which his benefits may be terminated. 29 U.S.C. § 1022(b). While a variety of circumstances caused the respondent's benefits notebook to be in error, including Hurricane Gilbert, the negligence of the personnel department and the murder of a corporate officer, the notebook never included these sorts of reasons as grounds for denying a benefit.

The law does allow the employer to change its welfare benefits package so as to deny or terminate either a specific pay practice or the whole plan. Rather than carry out the change and explain the change after the fact, as the respondent has done, ERISA provides that circumstances for denial be clearly stated ahead of time. With the framework in place, the employee knows what to expect, having advance notice of those legitimate scenarios which will cause a deprivation of benefits.

Since retaining the power to change a welfare benefit is enormous, especially in this day and age of mass layoff, there should be rational pattern for implementation of change. That pattern can be left up to the employer. At a minimum, there should be parameters as to timing, so that any loss of benefits does not occur suddenly, and the employee can make his own safety net to cope. Furthermore, as the cases hold, there should be a written product emerging from the change, so that the writing requirements of the statute prevail. Finally, exceptions should be made where consideration has passed and the employee is in a position of detrimental reliance.

It must be stressed that petitioner is not imputing a negative motive on his ex-employer. This case does not involve bad faith. Regardless of why the benefit plan was self-destructive, in the context of this litigation, it is deficient, as a matter of the law of disclosure and accuracy. It may very well be that an employer may lead the employee down a benefit lined path, only to force the employee to take an about-face losing his benefits on the return trip. It is just that ERISA requires that employer to place a "Dangerous Trail" sign at the beginning of the path.

The injustice which occurred here is that Air Jamaica's North American Employees were provided with a weighty document. An apparent transfer of wealth took place when the airline gave its non-union labor the benefits book with the official seal of approval, the corporate trademark and colors embossed on the cover. The benefits went on for sections and many pages, yet the deprivation of the benefits was figuratively fine print, occurring in one sentence in the middle of the last page.

While the entire document, writing-binding-image-and-all, conveyed a sense of legitimacy, it was an artificial offering, an illusory promise. Since an account executive or secretary or manager may not have had a benefit at all, that employee notebook was counterfeit in the currency of benefits; it was no less accomplished than a phony twenty dollar bill with the right mint shade and the right frictional texture, but which was printed by a thief working out of a garage. It looks impressive, but it is only worth the paper on which it is printed. Since the employer never was required to give welfare benefits in general or severance pay in particular, that deceptive benefits notebook need not have been distributed. Once it was offered, though, the employer should have stood by the benefit description and lived up to its word, there. Instead, it backed out of its promise, taking away that which it earlier so glowingly described.

On a policy level, this case should be heard because an affirmation of the lower court's decision will serve to undermine the statute. The reservation of rights clause is clearly an escape hatch for the employer, where the law already amply provides the employer with a variety of satisfactory options. If employers can escape the responsibility of paying benefits which are itemized in summary plan descriptions, based on the disclaimer, then it is foreseeable that the plan descriptions and employee notebooks will all have these reservations of rights. That way the employer benefits from the appearance of generosity to its employees, while retaining the dollar value of the benefits and pay practices it was supposed to deliver, but will not. Certainly this reservation of rights does not serve the employee. It is impossible to reconcile that discretionary power to defeat a benefit plan, with the statute and cases, such as *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90, 193 S.Ct. 2890, 2896, 77 L. Ed. 2490 (1983) or *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148, 105 S. Ct. 3085, 3093, 87 L. Ed. 2d 96 (1985), that desires to promote the interests of employees, and protect contractually defined benefits.

It is stretching things to say that nothing in ERISA prevents a reservation of rights, as the Court below did. That decision did not adequately confront the provisions in the statute mentioned above. Since the petitioner-employee did not receive the benefit that was described to him, this Honorable Court should reverse the decision below, as the respondent-employer's reservation of rights is irreconcilable with the disclosure and accuracy provision of ERISA, and, therefore, is void as being illegal and vague. Therefore, Robert L. Hamilton, respectfully requests that this Honorable Court enter judgment in his favor, and reverse the decision of the Court of Appeals.

CONCLUSION

In the law of torts, one may not have a duty to rescue a drowning person. However, if rescue is commenced by one with no duty to rescue, then certain standards of prudent care may be imposed on the rescuer.

In a similar way, the federal law of employee benefits does not force an employer to offer certain benefit plans or benefits.

If the employer does take steps in the direction of offering benefit plans to its servants, however, the strict standards of the Employee Retirement Income Security Act of 1974 becomes controlling.

The respondent's plan description fails to meet the standards of disclosure, accuracy, and detailed itemization in connection with modifications and denials of benefits. By delivering a summary plan description with a reservation of rights clause, the employer has wrongfully circumvented the statute.

It is urgent for this Honorable Court to review this case, to determine the propriety of this benefit plan. Petitioner, Robert L. Hamilton, asserts that statutory provisions do apply to this fact pattern, unlike the court below.

Since a significant portion of ERISA can be gutted by this technique of disclaiming promises to pay benefits, this issue is very important and justifies review. The dollar amount of benefits is extraordinary and the news of today often focuses on benefit issues such as health insurance coverage, corporate downsizing and factory shutdowns.

For these reasons, petitioner Robert L. Hamilton respectfully prays that these issues be reviewed by the highest authority in

this country, and that this Honorable Court grant a writ of certiorari.

ROBERT GILBERT LEINO
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Attorney for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 30, 1991

Filed September 30, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1933

HAMILTON, ROBERT L.

Appellee

v.

AIR JAMAICA, LTD.

Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 89-06133)

Argued April 15, 1991

BEFORE: STAPLETON, GREENBERG, and HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed September 30, 1991)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

Air Jamaica, Ltd. appeals from a judgment in favor of its former employee, Robert Hamilton, for additional severance pay in accordance with the terms printed in Air Jamaica's employee handbook ("the Handbook"). This case requires us to determine whether the Handbook is an ERISA plan and, if so, whether Air Jamaica's reservation of the right to determine non-pension employee benefits at the time they accrue is consistent with ERISA. We conclude that the Handbook is an ERISA plan and hold that Air Jamaica's reservation of the right to determine benefits as they accrue is consistent with ERISA and precludes Hamilton's claim. Accordingly, we will reverse the judgment for Hamilton.

I.

Hamilton was employed by Air Jamaica as an account executive in Philadelphia since 1976. In early March 1989, Hamilton received the employee handbook, which in addition to setting forth certain benefits contained the following provision:

> Although it is our present intention to continue these pay practices, employment policies and

> benefits, we reserve the right, whether in an individual case or more generally, to alter, reduce or eliminate any pay practice, policy or benefit, in whole or in part, without notice. Moreover, personnel actions taken or decisions made will not necessarily be reversed or modified if these policies or procedures are not followed.

Appendix at 107.

In a letter dated May 25, 1989, Hamilton received notice that his employment with Air Jamaica would be terminated effective May 31, 1989 as part of a corporate reorganization. The termination letter also outlined the severance benefits to which Hamilton would be entitled. The benefits outlined in the letter, and the benefits which Hamilton actually received, were substantially lower than those outlined in the employee handbook Hamilton was given in March of 1989.[1] According to Air Jamaica, the benefits scheduled for payment to Hamilton, as they were outlined in the termination letter, reflected their actual severance policy which had been in practice for a number of years. Air Jamaica also asserted that "[a]ll other employees terminated . . . before, after, and contemporaneously with Hamilton's termination, received severance pay in accordance with [the] actual policy. . . ." Brief for Appellant at 7. Air Jamaica contends that the incorrect policy outlined in the employee handbook was due

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1. The printed policy provided that an employee would receive four weeks severance pay for each year worked, with no cap on the total amount an employee could receive. Air Jamaica's "actual" policy provided that an employee would receive two weeks pay per year for each full year worked, capped at a maximum of three months' pay.

to a printer's error. Air Jamaica corrected the handbook error in writing on May 30, 1989, one day before Hamilton's actual termination, when Vice President of Administration, Campbell Barrow, sent a memorandum to all employees setting forth the "actual" severance policy.

Upon his termination, Hamilton filed suit in district court seeking severance pay in accordance with the written policy in the handbook. The district court held that, although the severance policy printed in the manual appeared to be a printer's error, under the Employee Retirement Income Security Act of 1974, § 402(b)(3), 29 U.S.C.A. § 1102(b)(3) ("ERISA") the employer was bound by that policy. *Hamilton v. Air Jamaica, Ltd.*, 750 F. Supp. 1259, 1267 (E.D. Pa. 1990). It held that a written plan must control over an unwritten plan and therefore concluded that the terms set forth in the Handbook were Air Jamaica's severance plan under ERISA.

The district court then considered whether Air Jamaica's reservation of the right to determine benefits on a case by case basis barred Hamilton's claim, but held that giving full effect to such a provision would be inconsistent with ERISA. The court further held that Air Jamaica, through the same explicit reservation, had reserved its right to amend the plan. Nevertheless, the court concluded that the amendment here – one day before Hamilton stopped working – was untimely and that recognizing it would frustrate ERISA's policy of protecting employees' legitimate expectations. The district court therefore entered judgment for

Hamilton on his claim for severance pay under ERISA.[2]

This court has jurisdiction over the final judgment of the district court pursuant to 28 U.S.C. § 1291. The district court had jurisdiction over the ERISA claims under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(f) and had pendent jurisdiction over the state law claims. The proper application of ERISA to the undisputed facts is a question of law over which we exercise plenary review.

II.

Air Jamaica contends that it is not bound by the severance pay provisions of the Handbook which were included only because of a printer's error. Instead, Air Jamaica argues it is bound only by its "actual" unwritten severance pay policy that it consistently followed and of which its employees were aware. We join the district court in rejecting that argument. The district court correctly held that "where an employer has published a plan document containing representation of intent to provide benefits, the employer cannot rely on [unwritten] evidence to the contrary", 750 F. Supp. at 1267, and that, in the absence of any other written description of benefits, the Handbook constituted Air Jamaica's ERISA plan.

In reaching that conclusion, the district court relied heavily on *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), in which this court

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2. The district court simultaneously denied Hamilton's state law contract claim for vacation pay because it found he had not provided sufficient proof Air Jamaica failed to give him his full vacation pay. Hamilton has not appealed from that portion of the judgment.

joined six other courts of appeals that refuse to recognize oral modifications to ERISA plans. *Hozier* interpreted 29 U.S.C. § 1102(a)(1)'s requirement that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument" and reasoned:

> [§ 1102(a)(1)] was designed to ensure that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.Rep. No. 1280, 93rd Cong., 2d Sess. 297, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5077-78. Employees entitled to rely on the terms of a written benefit plan "should not have their benefits eroded by oral modifications to the . . . plan." *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1296 (5th Cir. 1989). "Congress, in passing ERISA, did not intend that participants in employee benefit plans should be left to the uncertainties of oral communications in finding out precisely what rights they were given under their plan.

908 F.2d at 1163-64. All the cases decided before *Hozier* had rejected oral modifications that increased benefits, and this court concluded that the policies behind ERISA made it even more important to disallow oral modifications that decrease benefits. *Id.* at 1163.

Hozier held that the requirement of 29 U.S.C. § 1102(a)(1) that all ERISA plans be written prevents an unwritten amendment from being an enforceable part of an ERISA plan. Therefore, it follows that Air Jamaica's unwritten severance pay policy could not be its ERISA plan and that the Handbook was its ERISA plan.

Appendix A

III.

Having determined that the Handbook constituted an ERISA plan, the district court was forced to decide whether Air Jamaica's reservation of the right to determine benefits on a case-by-case basis prevented Hamilton from having an enforceable claim to the severance benefits described in the Handbook. The district court concluded that Air Jamaica's reservation should not be given effect because it conflicted with ERISA:

> Read literally, the Air Jamaica disclaimer could be taken to mean that Air Jamaica is under no obligation at any time to award benefits in accord with its written promises. To the contrary, Congress enacted ERISA to provide security in benefits packages. *Hozier* stands for the rule that plan participants are entitled to rely, and to continue to rely, on an employer's current writing until those writings are in fact amended.

750 F. Supp. at 1270. While we agree that an employee is entitled to rely on the employer's current writing until it is duly amended, we nevertheless conclude that nothing in ERISA prevents Air Jamaica from providing its employees with benefits on a case by case basis – as long as that limitation is explicitly stated as part of the plan.[3]

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3. Because we conclude that Hamilton had no claim for severance benefits under the ERISA plan described in the Handbook, we need not decide whether the May 30, 1989 letter was an effective amendment of that plan. This court has questioned whether an employer can amend a plan where, as here, the plan fails to spell out an amendment procedure as required by 29 U.S.C. § 1102(b)(3). *See Frank v. Colt Indus.*, 910 F.2d 90, 98 (3d Cir. 1990); *Flick v. Borg-Warner Corp.*,

Appendix A

We find the arguments against enforcing the reservation unpersuasive. First, Air Jamaica's reservation is not an attempt, as the district court asserted, to avoid "award[ing] benefits in accord with its written promises." On the contrary, the reservation is part of the written promise and a limitation upon it. While ERISA was enacted to provide security in employee benefits, it protects only those benefits provided in the plan. For example, even if an oral amendment of an ERISA plan would increase employee benefits, ERISA does not provide for the enforcement of that amendment because it is not part of the plan. *See, e.g., Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986)(refusing to enforce oral promise to use more favorable valuation date in determining employee's share of plan assets). Therefore, unless the reservation can be shown to violate the policies behind ERISA, it must be enforced as part of the plan.

Second, no credible argument can be made that ERISA required Air Jamaica to provide Hamilton with better or more definite benefits. ERISA does not require Air Jamaica to provide its employees with a benefits plan, *Viggiano v. Shanango China Div. of Anchor Hocking Corp.*, 750 F.2d 276, 279 (3d Cir. 1984), nor does ERISA require that Air Jamaica provide any particular set of benefits, if it decides to establish a welfare benefits plan.[4] *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283

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892 F.2d 285, 291 (3d Cir. 1989)(Becker, J., concurring in part and dissenting in part).

4. Pension plans are subject to participation, vesting and funding requirements that do not apply to welfare benefit plans.

(3d Cir. 1988). "ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans." *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).

Third, it is not true that permitting employers to reserve the right to make individual benefit determinations will render the protections of ERISA illusory. While ERISA imposes no substantive requirements on what welfare benefits are provided, it requires that welfare benefit plans be established, maintained, and disclosed in accordance with its procedural safeguards. The reporting requirements serve "two salutary purposes . . . to ensure that 'the individual participant knows exactly where he stands with respect to the plan' and 'to enable employees to police their plans.'" *Hozier*, 908 F.2d at 1170. Full disclosure also permits employees to bargain further or seek other employment if they are dissatisfied with their benefits. Enforcing Air Jamaica's reservation does not subvert any of these objectives. Unlike employees who rely on some informal "understanding" about what their benefits are, Air Jamaica's employees are on notice that they have no guaranteed benefits.

Our conclusion here is a logical extension of *Hlinka*, *supra*. In that case, we found an employer's reservation of the right to award early retirement benefits[5] to a certain class of employees only under when the employer believed "that [the particular employee's] retirement would . . . be in

5. Like welfare benefits, early retirement benefits are not subject to the substantive protections applicable to pension plans. *Hlinka*, at 284-85.

its interest" was not prohibited by ERISA. *Id.* at 283. Having concluded that ERISA permits an employer to reserve the right to make early retirement benefit determinations on an individual basis, nothing suggests we should treat severance pay differently.

Reservations to the employer to make welfare benefits determinations on an individual basis are not prohibited by ERISA and allowing them furthers the interest of employees. Employers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits. To the extent that employees have sufficient bargaining power to obtain guaranteed benefits, ERISA will enforce those rights and will ensure – through its disclosure requirements – that employees know what benefits they will receive. Therefore, allowing employer reservations of the right to make individual benefit determinations takes nothing away from employees who can command guaranteed benefits and will allow other employees to obtain benefits the employer would refuse to provide on a guaranteed basis.

In short, we conclude that Air Jamaica had no obligation to provide Hamilton with a definite amount of severance pay and that its reservation of the power to determine severance benefits on a case by case basis is therefore valid.[6]

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6. In *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991), we suggested that a *Hlinka* type reservation may impose, as a matter of contract, a "minimal obligation of good faith" on the employer. *Id.* at 919. But Hamilton cannot credibly claim that, in awarding him the same severance pay that it awarded all similarly situated employees, Air Jamaica acted in bad faith; in fact,

Appendix A

IV.

We conclude that the Handbook constituted Air Jamaica's ERISA plan. We also hold that Air Jamaica's reservation in that plan of the right to make individual benefit determinations is consistent with ERISA and bars Hamilton's claim. Accordingly, we will reverse the judgment for Hamilton.

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the district court specifically noted that "[t]here is no evidence of bad faith by Air Jamaica in this case." 750 F. Supp. at 1267.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 30, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1933

ROBERT L. HAMILTON, Appellee

vs.

AIR JAMACA, LTD.,

Appellant

(D.C.Civ.No.89-6133)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: STAPLETON, GREENBERG and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel April 15, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 2, 1990, be, and the same is hereby reversed.

Appendix B

Costs taxed against the appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Sally Mrvos
Clerk

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED NOVEMBER 2, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 89-6133

ROBERT L. HAMILTON

v.

AIR JAMAICA, LTD.

OPINION

GAWTHROP, J.

Plaintiff, Robert Hamilton, brought this action against his former employer, defendant, Air Jamaica, Ltd., seeking additional severance pay under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002 *et seq.*, and additional vacation pay under Pennsylvania contract law. After conducting a bench trial on the merits of these claims, I find for plaintiff on the severance pay claim and for defendant on the vacation-pay claim.

FINDINGS OF FACT

1. Plaintiff began working for defendant, Air Jamaica, Ltd., as a sales representative in August, 1976. Plaintiff was promoted to account executive in 1985 and was working in that position

in Philadelphia when Air Jamaica terminated his employment on May 31, 1989.

2. Air Jamaica terminated plaintiff's position as part of a corporate reorganization brought on by budgetary problems. *See* Testimony of Oswald Simpson, Air Jamaica Director of Industrial Relations, Transcript at 76.

3. At the time of his termination, plaintiff was an "exempt" employee, as defined on page 2 of the "Policies and Procedures" section of Air Jamaica's Employee Handbook ("Handbook"). *See* Plaintiff's Exhibit One.

4. Air Jamaica distributed the Handbook — a written document outlining the components of Air Jamaica's employee benefits program, including vacation benefits and separation pay benefits — to all of its employees early in 1989. Plaintiff received his copy of the Handbook early in March, 1989. See Plaintiff's Exhibit One, cover letter dated 3/06/89.

5. The Handbook contains a description of a policy to pay employees separation pay. The Handbook states that "[i]f termination occurs due to job elimination or reorganization, a non-exempt employee will receive 2 weeks a year for each full year worked and an exempt employee will receive four weeks for each full year worked." *See* Plaintiff's Exhibit One, Policies and Procedures at 7.

6. The separation pay policy described in the handbook was not the policy that Air Jamaica intended to be included therein. Air Jamaica has a longstanding separation pay practice, as evidenced by its conduct prior to and after plaintiff's termination, to pay separation pay in the amount of two weeks pay for each

full year of employment, with a maximum payment of three months. *See* testimony of Simpson, transcript at 78-81.

7. Air Jamaica retained the consulting firm of Foster-Higgins, to help prepare the Handbook. The incorrect statement of Air Jamaica's separation pay policy was written into the Handbook by Linden Dunn, a Foster-Higgins employee, during production at Foster-Higgins. *See* testimony of Simpson, transcript at 83. Air Jamaica failed to discover the mistake during proofreading of the Handbook. *Id.* at 91-92.

8. Air Jamaica's preparation of the Handbook, including supervision over and copy-editing of its contents, was frustrated by a tight deadline, personal tragedy and natural disaster. The officer who spearheaded the project was murdered in the summer of 1988 in the course of a labor dispute with Air Jamaica pilots. Testimony of Simpson, transcript at 86. His assistant died in the same week of natural causes. *Id.* In September, 1988, Jamaica was ravaged by Hurricane Gilbert, shutting down Air Jamaica operations for a full two weeks and putting the Handbook project on hold until late in the year. *Id.*, at 90. During the entire course of the project, Air Jamaica officers were preoccupied with the company's medical benefits package, which was undergoing change, and a desire to release the Handbook concurrent with this change at the beginning of 1989. *Id.* at 89-91.

9. Air Jamaica discovered the mistake in the Handbook regarding Air Jamaica's separation pay policy after the decision to terminate plaintiff's employment. Mr. Simpson first became aware of the error on May 25, 1989, while in the Philadelphia office to personally inform plaintiff of the termination. *See* testimony of Simpson, transcript at 93, 108.

Appendix C

10. Mr. Simpson gave plaintiff a letter on 25, 1989, memorializing the terms of plaintiff's termination, to become effective on May 31, 1989. The letter indicated that plaintiff would be paid a "terminal gratuity" based on the formula of "two weeks pay for each year of employment to a maximum of three months' payment". *See* Plaintiff's Exhibit Two.

11. Air Jamaica sent a memorandum, dated May 30, 1989, to all affected employees, advising them that there was an error in the Handbook's description of the separation pay policy. Testimony of Simpson, transcript at 93. The memorandum advised that the Handbook should state that employees terminated due to job elimination or reorganization will receive "a terminal gratuity based on two weeks' basic pay per year for each full year worked up to maximum of three months' pay." *See* plaintiff's Exhibit Five.

12. Plaintiff received the errata memorandum on May 30, 1989. *See* testimony of Hamilton, transcript at 56.

13. Air Jamaica paid defendant a terminal gratuity amounting to three months pay.

14. Plaintiff made a demand to Air Jamaica on June 3 requesting a severance payment in accord with the policy described in the Handbook. *See* Plaintiff's Exhibit Three. By letter of July 14, Air Jamaica indicated that its policy is to pay severance in the amount of two weeks per year worked with a maximum payment of three months. *See* plaintiff's Exhibit 4.

15. The Handbook contains a disclaimer, whereby Air Jamaica reserved the right in individual cases and generally, "to alter, reduce or eliminate any pay practice, policy or benefit, in

whole or in part, without notice''. *See* plaintiff's exhibit one, Policies and Procedures at 1. The Handbook further contains a ''statement of understanding'', which employees are instructed to date, sign and return to their supervisors, indicating that they have reviewed the policies and procedures section of the Handbook and understood the disclaimer contained therein. *Id.*, Policies and Procedures at 8.

16. Plaintiff did not sign and return the statement of understanding because he did not wish to consent to the powers Air Jamaica reserved for itself through the disclaimer. *See* testimony of Hamilton, transcript at 13-14.

17. Air Jamaica has a policy, and had a policy at the time of plaintiff's termination, to pay terminated employees for accrued vacation time. *See* testimony of Simpson, transcript at 95-97. The policy allows carryover from one year to the next, but does not allow an employee to carry over in one year more than one year's vacation entitlement. *Id.* at 95.

18. Air Jamaica keeps, and kept at the time of plaintiff's termination, records of available vacation time for all of its North American employees. At the conclusion of each year, individual reports stating the accrued vacation time for each employee are sent to the employees' departments and distributed to the employees for review. Employees that disagree with the report are to notify their supervisors so necessary adjustments can be made. *See* testimony of Simpson, transcript at 96-97; testimony of Frank Carter, Regional Director of Air Jamaica's Philadelphia Office, transcript at 118.

19. Plaintiff was given a report, stating the vacation days earned by him, in January, 1989. *See* testimony of Carter,

transcript at 118; *contra* testimony of Hamilton, transcript at 34.

20. Air Jamaica records showed that plaintiff was due 12 vacation days at the time of his termination. Testimony of Simpson, transcript at 102.

21. Plaintiff kept his own personal record of accrued vacation days in a daily work log. Plaintiff did not take Air Jamaica's carry-over policy into consideration when calculating accrued vacation time in his work log. *See* testimony of Hamilton, transcript at 36-38. At the time of his termination, plaintiff's personal records showed that he was entitled to pay for 26 vacation days. *Id.*, at 28.

22. Air Jamaica paid plaintiff in full for 12 vacation days.

23. Plaintiff made a demand to Air Jamaica for payment for 14 additional vacation days. *See* plaintiff's Exhibit Three. In a letter by Oswald Simpson dated July 14, 1989 Air Jamaica agreed that plaintiff was entitled to 26 days vacation pay and promised to pay the balance no later than July 31, 1989. *See* plaintiff's Exhibit Four. Mr. Simpson later determined that this concession was an error, in that he had erroneously considered plaintiff entitled to a full vacation allotment for 1989, when in fact plaintiff was entitled only to a proportional allotment for 1989 measured by the percentage of 1989 in which plaintiff worked for Air Jamaica. Testimony of Simpson, transcript at 101.

DISCUSSION

I. *Jurisdiction and Applicable Law*

ERISA provides a cause of action under federal law to any

participant or beneficiary of a benefit plan to recover benefits due under the plan, if the plan falls within the scope of the statute. 29 U.S.C. § 1132(a)(1)(B). The statute covers two types of plans, pension plans, 29 U.S.C. § 1002(2)(A), and welfare plans, 29 U.S.C. § 1002(1). Welfare plans include any "plan, fund, or program" established or maintained by an employer for the purpose of providing certain benefits to its employees or their beneficiaries. Benefit plans providing severance pay are considered welfare plans covered by ERISA. *See Massachusetts v. Morash* 490 U.S. 107, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98, 109 (1989); *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3rd Cir. 1989); *Blau v. Del Monte Corp,* 748 F.2d 1348, 1352 (2d Cir. 1984). This is true whether or not the severance benefits are paid out of a separately established fund. *Gilbert v. Burlington Industries* 765 F.2d 320, 324-25 (2d Cir. 1985). On the other hand, vacation plans that pay benefits out of a company's general assets have been held to be outside the scope of ERISA. *Morash* 490 U.S. at 107, 109 S.Ct. at 1673, 104 L.Ed. at 109. Plaintiff's severance pay claim is thus covered by ERISA while plaintiff's vacation pay claim is left-to be governed by the Pennsylvania common law of contract.

This court's jurisdiction over the plaintiff's severance-pay claim is predicated upon 28 U.S.C. § 1331, which gives this court the authority to hear claims based on federal law, and 29 U.S.C. § 1132(f), which gives this court specific power to hear claims brought by plan participants under ERISA. Jurisdiction over plaintiff's vacation-pay action is based on this court's inherent jurisdiction over pendent state-law claims. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966).

Appendix C

II. *Severance Pay Claim*

A. *Governing Plan*

Before determining whether defendant breached an obligation to pay benefits under its severance pay plan, it is necessary to determine which plan defendant was charged under ERISA to operate. Plaintiff argues that Air Jamaica was bound to the separation pay plan described in the Handbook. Defendant counters that the Handbook plan was an error and that the plan Air Jamaica intended to include in the Handbook — the plan established by Air Jamaica's pattern and practice — should control. After reviewing the language and purpose of ERISA, I find that the policy as written in the Handbook must govern the dispute.

ERISA reguires that every employee benefit plan be "established and maintained pursuant to a written instrument", 29 U.S.C. § 1102(a)(1), and provides several ways for participants to receive information about the plan. ERISA requires that employers or plan administrators deliver to participant employees a "summary plan description" that is "written in a manner calculated to be understood by the average plan participant", 29 U.S.C. § 1022(a)(1) and that contains, among other things, a description of requirements for eligibility, circumstances that may result in denial of benefits, and procedures for making a claim. 29 U.S.C. § 1022(b). ERISA also provides that the plan administrator shall make all plan documents available for review by employees upon their request. 29 U.S.C. § 1024(b)(2).

The only written description of Air Jamaica's severance pay policy adduced at trial was the Handbook description. Plan descriptions in employee handbooks or otherwise distributed to

employees are considered ERISA plan documents. *See Alday v. Container Corp. of America*, 906 F.2d 660, 667 (11th Cir. 1990); *Eardman v. Bethlehem Steel Corporation Employee Welfare Benefit Plans*, 607 F.Supp. 196, 207 (W.D.N.Y. 1984). One document can serve as both the "summary plan description" required under 29 U.S.C. § 1022(b) and the "written instrument" required under 29 U.S.C. § 1102(a)(1). *See Alday*, 906 F.2d at 662, n.2.

If, as defendant contends, the Handbook policy was not Air Jamaica's true severance pay policy, Air Jamaica must be seen to have breached both of these requirements. Air Jamaica prepared no written instrument or summary description for the purportedly true policy. By disclosing an inaccurate version of the policy while harboring the true one, Air Jamaica may be liable for misrepresentation. *See Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1185 (3rd Cir. 1985) (disclosures by employers that mislead, misinform or otherwise fail to inform employees of their rights under a benefit plan have are actionable). However, I need not reach this issue, as I find that the policy behind ERISA's writing and reporting provisions requires me to treat the writing in the Handbook not as a misrepresentation, but as Air Jamaica's severance pay plan.

ERISA's writing and reporting requirements are designed to protect the interests of employees in their benefit plans by ensuring that employees are apprised of their rights and obligations under the plans. *See Genter* 776 F.2d at 1185; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356 (2d Cir. 1984); *Donovan v. Dillingham*, 658 F.2d 1367, 1372 (11th Cir. 1982). By mandating that plans be in writing, available for review, and disclosed in summary descriptions, Congress intended to provide employees with the means to "determine exactly what [their] rights and obligations

are under the plan[s]", *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 (3rd Cir. 1990) (quoting H.Rep. No. 1280, 93rd Cong., 2d Sess. 297, *reprinted* in 1974 U.S.Code Cong. & Admin. News 5038, 5077-78), and the information to enable them to "police" administration of these plans. *Blau*, 748 F.2d at 1354 (quoting H.R.Rep.No. 93-533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 4639, 4649).

In so providing, Congress clearly contemplated that employees would rely on the written documents prepared and disclosed by employers. In a case factually similar to the one at bar, the Third Circuit held that the right of employees to rely on written plan documents precludes oral modification of benefit plans. *See Hozier* 908 F.2d at 1163-64. In *Hozier* an administrator denied severance benefits under a 1985 written plan that provided severance pay according to age and years of service, and followed instead an 1987 amended plan that provided a flat two weeks severance pay to all terminated employees. The *Hozier* Court held that the original plan controlled, because the amended plan had not been reduced to writing before the employees were terminated. *Id.*

In doing so, the Third Circuit cited to opinions from six other circuits holding that written documents cannot be modified by oral communications. *See Nachwalter v. Christie,* 805 F.2d 956, 960 (11th Cir. 1986); *Pizlo v. Bethlehem Steel Corp.* 884 F.2d 116, 120; *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989); *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988); *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Straub v. Western Union Telegraph Co.* 851 F.2d 1262, 1265 (10th Cir. 1988). Each of these cases held that plan administrators could not be bound to oral representations purportedly offering benefits greater than those provided in written benefit plans. Hozier established the same for oral amendments

decreasing available benefits, stating that Congress did not intend for plan participants to be "left to the uncertainty of oral communications". *Hozier*, 908 F.2d at 1164 (quoting *Musto*, 861 F.2d 909-10). Indeed, Congress intended that plan documents and summary descriptions "exclusively govern" an employer's obligations under ERISA. *Moore*, 856 F.2d at 492.

The present case is indistinguishable from *Hozier*. Although the written plan here is one that Air Jamaica never intended to control, while the written plan in *Hozier* was one the employer intended to supercede, the reasoning of *Hozier* demands that even mistaken writings govern over an unwritten practice. Both cases involve a written representation contradicted by an employer's unwritten intent; *Hozier* holds that the writing must control because of the plan participants' reliance interest in the instrument. Nothing in Hozier suggests grounds for modifying this rule when the written document is published mistakenly. The circumstances under which Air Jamaica prepared the Handbook were undeniably trying. Nevertheless, plan administrators are under an obligation to report accurately, 29 U.S.C. § 1022(a)(1), and, under *Hozier* are bound to the representations they make.

Indeed, other courts have held that employers are bound to their disclosures even where there is written evidence of a contrary intent. The Sixth Circuit has held that when there is a conflict between plan documents and the summary plan descriptions disclosed to employees, the terms of the summary plan control. *Edwards v. State Farm Mutual Auto Insurance Co.*, 851 F.2d 134, 136 (6th Cir. 1988), citing *Rhoton v. Central States Southeast & Southwest* 717 F.2d 988, 989-991 (6th Cir. 1983). The Sixth Circuit reasoned that Congress' clear prohibition against misleading summary descriptions, and the resulting right of employees to rely on descriptions made, prevent an employer from

relying on plan documents to the contrary. *Edwards*, 851 F.2d at 136. Under *Edwards*, Air Jamaica would be bound to the plan in its Handbook even if its intended plan had been reduced to writing but not disclosed to employees.

Defendant seeks to avoid the result compelled by *Hozier* and *Edwards* by pointing to the Supreme Court's recent ruling in *Firestone Tire & Rubber Co. v. Bruch* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Finding that ERISA "abounds with the language and terminology of trust law", 109 S.Ct. at 954, 103 L.Ed.2d at 92, the Supreme Court in *Firestone* looked to trust principles to determine the standard of review for courts to apply in § 1132(a)(1)(B) actions. While ERISA provides for judicial review in these actions challenging an administrator's denial of benefits, it does not set out the applicable standard of review. Drawing from trust law, the Court determined that the standard of review would be *de novo*. 109 S.Ct. at 954-955, 103 L.Ed.2d at 93-94. Defendant argues by the same logic that since "intent" is paramount under the law of trusts in determining how a trust is distributed, the "intent" of Air Jamaica regarding severance pay, and not the Handbook policy, should determine the parameters of Air Jamaica's severance pay plan.

This result is neither compelled by nor consistent with the logic of *Firestone*. The Supreme Court turned to trust principles in *Firestone* to fill a gap where ERISA was silent. *See* 109 S.Ct. at 953, 103 L.Ed.2d at 91. With regard to writing and disclosure, ERISA is not silent and thus the gap-filling methodology of *Firestone* is inappropriate. Further, the actual holding of *Firestone* suggests the importance of favoring written instruments over parol evidence of intent.

Before the Supreme Court's ruling in *Firestone*, most federal

courts applied an arbitrary and capricious standard of review to an administrator's denial of benefits. By rejecting this standard in favor of *de novo* review, the Court expressed its determination that ERISA's goal of protecting employee interests in benefit plans is fully served only if courts, and not plan administrators, are the ultimate arbiters over interpretation of plan terms. *See* 109 S.Ct. at 955-56, 103 L.Ed.2d at 94. Judicial review over administrative decisions is a central component of ERISA's scheme for protecting employee interests. In the case at bar, Air Jamaica would have this court review a plan that was manifest only in the prior practice of the company and established only by the testimony of company officials. There is no evidence of bad faith by Air Jamaica in this case. Nevertheless, it is clear that the role assigned to the courts in *Firestone* is undermined any time there is no written evidence of intent for the court to interpret. See *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1355-56 (2d Cir. 1984) (refusing to refer to "secret" unwritten evidence of intent, including past practice, in interpreting appropriateness of a denial of severance benefits).

Employers cannot avoid ERISA by refusing to prepare any formal documents. *Donovan v. Dillingham* 688 F.2d 1367, 1372 (11th Cir. 1982). Where no plan documents exist, courts will have to look to other evidence to establish plan terms. Nevertheless, where an employer has published a plan document containing representation of intent to provide benefits, the employer cannot rely on evidence to the contrary.

B. *Violation of the Severance Pay Plan*

Determining that the Handbook policy governed defendant's actions does not dispose of the case. Although it is not disputed that Air Jamaica failed to comply with the terms of the severance

pay plan represented in the Handbook, the Handbook contained a disclaimer allowing Air Jamaica to modify the plan without notice. Air Jamaica's decision on May 25, 1990, to provide plaintiff with severance pay in accord with its timehonored formula and contrary to the representation of the Handbook was in effect a modification of the Handbook's severance pay plan. This modification was reinforced by Air Jamaica's written notification to all employees, amending the Handbook to reflect Air Jamaica's established pattern and practice regarding severance pay. Ultimate disposition of the action depends upon whether this modification was proper under ERISA and effective as to plaintiff.

1. *Standard of Review*

In *Firestone*, the Supreme Court held that the *de novo* standard applies unless the benefit plan gives the administrator discretionary authority to determine eligibility or construe terms of the plan. 109 S.Ct. at 956, 103 L.Ed.2d at 95. Defendant argues that the benefit plan in question provides such discretionary authority. As evidence of this provision, defendant points to the disclaimer in the employee Handbook, in which Air Jamaica reserved the right "to alter, reduce, or eliminate any pay practice, policy or benefit . . ." I decline to hold that the reservation of a power to amend a benefit plan constitutes the reservation of discretionary authority to interpret the terms of the plan. If employers were free to amend benefit plans at any time and under any conditions, the question of interpretation would be a nullity. Yet the right to amend under ERISA is not unbounded. *See infra* section II(B)(2). Thus it is not incompatible under ERISA for an administrator to have a power to amend and not have the power to interpret plan terms when disputes arise. The Air Jamaica Handbook, by its plain terms, does not reserve the latter.

Appendix C

Yet even if a power to interpret was reserved to the plan administrator in this case, it would have little bearing on the decision. Defendant argues that it was not arbitrary for Air Jamaica to grant severance pay in accord with its past practice rather than in accord with the Handbook plan. However, the arbitrary and capricious standard in the context of ERISA connotes deferential review of a plan administrator's decision, not a substantive standard of liability. *Hozier,* 908 F.2d at 1168. ERISA requires a plan administrator to administer a plan "in accordance with the documents and instruments governing the plan". 29 U.S.C. § 1104. Thus the question is not whether Air Jamaica's decision to abandon the Handbook was arbitrary, but whether the court should defer to Air Jamaica's interpretation of the Handbook plan. The facts are uncontroverted that Air Jamaica did not interpret the substantive provisions of the Handbook policy, but chose rather to amend them. At the core of the case are issues regarding power to amend benefit plans under ERISA that require an interpretation of the statute. Questions regarding interpretation of the plan document and legal standards for reviewing this interpretation are not controlling.

2. *Right to Amend*

ERISA requires that employees serving as administrators of benefit plans act as fiduciaries with respect to plan participants, discharging their duty "solely in the interest of [plan] participants and beneficiaries". 29 U.S.C. § 1104(a)(1). However, administrators assume their fiduciary obligations under ERISA only when serving in their capacity as plan administrators. *Hozier* 896 F.2d at 1158. When deciding whether to provide benefit packages to their employees, and what benefits to provide, employers are not acting under the scope of ERISA, as ERISA does not require employers to provide any specific benefits. *See*

Appendix C

Hlinka v. Bethlehem Steel Corp. 863 F.2d 279, 283 (3rd Cir. 1989). The Third Circuit, following the decisions of other federal circuits, has thus held that when an employer decides to amend or terminate an employee benefit plan, the employer is not acting as a plan administrator and is not constrained by fiduciary obligations. *Id.* at 1162. *See also Flick v. Borg-Warner Corp.*, 892 F.2d 285, 288 (3rd Cir. 1989).

However, the Third Circuit in *Hozier* also recognized that an employer's power to amend a welfare benefits plan may not be wholly unrestricted. First, the court stated that employees are free to bargain for terms that bind an employer's ability to alter non-vested rights in benefits packages. *Id.* at 1162. Second, the court stated, without deciding, that an amendment might be invalid if an employer fails to expressly reserve the power to amend, or fails to notify employees of an amendment, or fails to follow other formalities mandated by ERISA. *Id.* at 1162. Third, the court expressly held that amendments made orally are invalid if not reduced to writing prior to the vesting of rights that the amendments attempt to alter. *Id.*, at 1164.

a. *Contractual Obligations*

Plaintiff argues that Air Jamaica is contractually bound to provide severance pay according to the terms of the Handbook. Plaintiff contends that the severance pay benefits were offered to plaintiff as part of a total compensation package, and as such were owed to plaintiff at the termination of his employment in accord with the employment agreement.

State common law contract claims that relate to a benefit plan covered by ERISA are preempted. 29 U.S.C. § 1144(a). In an order issued on August 21, 1990, I dismissed plaintiff's breach

of contract claim on this ground. However, the Supreme Court has stated that ERISA was designed to "protect contractually defined benefits", *Massachusetts Mutual Life Ins. Co. v. Russel*, 473 U.S. 134, 148 (1985). Contract principles may thus control a claim under ERISA as a matter of federal common law. *See e.g. Bruch v. Firestone Tire & Rubber*, 828 F.2d 134, 147 (3rd Cir. 1987) *aff'd in part and rev'd in part on other grounds*, 103 L.Ed.2d 80. If an employer and employee bargain for terms that bind the employer to pay certain benefits, those terms will be upheld. *See Hozier*, 896 at 1152; *Flick v. Borg-Warner*, 892 F.2d at 292 (Becker, J., concurring in part and dissenting in part).

Here, there is no evidence that the parties agreed that Air Jamaica would be bound to the severance pay plan in the employee Handbook. Rather, the evidence is to the contrary that Air Jamaica did everything it could to disclaim any such obligation by including a reservation of rights in the Handbook and asking all employees to sign a form indicating that they read and understood this reservation. At trial, plaintiff's counsel made much of plaintiff's having refused to sign the disclaimer because he did not agree to the reservation. Whatever the effect of this refusal, it does not bind Air Jamaica to provide benefits as if the reservation were not present. ERISA does not provide employees with a line item veto over their benefit packages. Defense counsel also noted plaintiff's failure to sign the disclaimer, arguing that it demonstrates plaintiff's refusal of the benefit package, making plaintiff a nonparticipant in the plan and unable to challenge its administration. This argument is equally implausible. The disclaimer and signature form was simply a device for Air Jamaica to ensure that its employees read and understood the terms of the benefits plan. Plaintiff's failure to sign has no bearing on whether plaintiff was a participant or how the plan is to be interpreted.

Appendix C

b. *Formal Requirements of ERISA*

The same section of ERISA that requires benefit plans to be maintained pursuant to a written instrument requires that the writing include a procedure for "amending such plan, and for identifying the persons who have authority to amend the plan". 29 U.S.C. § 1102(b)(3). At least one judge on the Third Circuit has suggested that this provision may restrict an employer's right to amend a severance pay plan, if an amendment procedure is not provided in the plan as required. *See Flick*, 892 F.2d at 291 (Becker, J., concurring in part and dissenting in part). Writing separately in *Flick* Judge Becker argued that § 1102(b)(3) can be read as ERISA's analog to the trust principle that requires a settlor to expressly reserve a power to modify the terms of a trust if such a power is to be retained. 892 F.2d at 291. Judge Becker would thus have held in *Flick* that an attempted modification of a plan that did not contain a reservation of power to modify was invalid. The majority in *Flick* did not address the issue, finding it not properly presented for review. 892 F.2d at 288. Writing for the majority in *Hozier* Judge Becker again referred to this theory, but did not reach it. 908 F.2d at 1163.

Assuming arguendo that this theory would be adopted by the Third Circuit, it does not control this case. Although Air Jamaica did not set out in the Handbook a procedure for amending its benefit plans, as required by § 1102(b)(3), it clearly reserved the right to amend. Nothing in this case suggests any prejudice to plan participants stemming from an absence of knowledge about the specific procedures under which amendments would be made.

c. *Timeliness of the Amendment*

Given that Air Jamaica had a right to modify its benefits

plan, the question remains whether the plan was properly modified with respect to plaintiff. In *Hozier*, the Third Circuit ruled that an amendment of a severance plan that was not reduced to writing before the termination of certain employees would have no effect with respect to these employees. 908 F.2d at 1164. The present case presents the situation of an amendment reduced to writing at or about the same time of plaintiff's termination. Although the memorandum circulating the amendment was dated May 30, 1989, one day before the effective date of plaintiff's termination, Air Jamaica did not realize its mistake or attempt to amend the Handbook until May 25, 1989, the day plaintiff was told of his termination and given the letter informing him of its terms. The issue, then, is whether *Hozier* requires that an amendment made around the time of termination, and after termination is announced, be found to be legally ineffective.

I find that it does. In *Hozier* the Third Circuit was concerned with the expectation and reliance interests of employees. The court specifically noted that the purpose behind ERISA's writing requirement is to provide employees the ability, "on examining plan documents", to determine their exact rights and obligations under a benefit plan. *Hozier*, 908 F.2d at 1163 (quoting H.Rep. No. 1280, 93rd Cong., 2d Sess. 297, *reprinted in* 1974 U.S.Code Cong. & Admin. News 5038, 5077-78). The court also recognized an "entitlement" of plan participants to rely on terms of written plans. *Hozier*, 908 F.2d at 1163. Thus the court held that the unwritten amendment was ineffective at the time of termination because the employees were entitled to rely on the written plan and to expect to be paid accordingly. *See also Flick*, 892 F.2d at 291, n. 9 (Becker, J., concurring in part and dissenting in part) (discussing the right to amend a welfare benefit plan as depending on the employees' expectation and reliance interests).

Here, the written amendment to the severance plan was not

made until after plaintiff was notified of his termination and immediately before the termination became effective. At the time he was notified of his termination, plaintiff expected to be paid according to the Handbook, which had not yet been amended to give him cause to expect otherwise. *Hozier* demands that this expectation be upheld.

Defendant argues that plaintiff should not be entitled to rely upon the Handbook because of the disclaimer that gives Air Jamaica the right to modify at any time without notice. Indeed, the written plan in *Hozier* apparently contained no similar reservation of right. *See Hozier*, 908 F.2d at 1163, n.9. However, the Third Circuit explicitly declined to address the absence of a reservation of a right to modify in holding the oral amendment in that case to be invalid. *Id.* Further, since ERISA requires administrators to act in accord with plan documents only to the extent their terms are consistent with the provisions of the statute, 29 U.S.C. § 1104(a)(1)(D), Air Jamaica's disclaimer must be read in light of ERISA's goal of protecting employee interests in benefit plans. Read literally, the Air Jamaica disclaimer could be taken to mean that Air Jamaica is under no obligation at any time to award benefits in accord with its written promises. To the contrary, Congress enacted ERISA to provide security in benefit packages. *Hozier* stands for the rule that plan participants are entitled to rely, and to continue to rely, on an employer's current writings until those writings are in fact amended. That the employer gives itself the right to amend does not change this rule.

It is important to note that *Hozier* is not predicated on proof of actual reliance by plan participants. Indeed, in *Hozier*, the terms of the written plan were never disclosed to plan participants, *see* 908 F.2d at 1157, precluding any actual reliance on their part. *See also Edwards*, 851 F.2d at 137 (plan participants misled by

summary description do not have to prove detrimental reliance in order to recover in accord with description). Similarly, *Hozier* is not predicated on the employer's failure to notify participants of the amendment. ERISA specifically provides that an employer must disclose any "material modification" in the terms of a plan "not later than 210 days after the end of the plan year in which the change is adopted". 29 U.S.C. § 1024(b)(1). The plaintiffs in *Hozier* asserted a claim under this notice provision. The Third Circuit declined to reach this claim, finding the amendment invalid instead under the § 1102(a)(1) writing requirement. *Hozier*, 908 F.2d at 1167.

That *Hozier* does not rest on actual notice or reliance may appear to lead to incongruous results, since the basis of the rule announced in *Hozier* is the protection of the reliance or expectation interests of plan participants. By its terms *Hozier* invalidates all amendments to welfare benefit plans that are not reduced to writing before the vesting of participants' rights under the plan, whether or not the participants have been notified of or are aware of the original plan or the amendment. Similarly, *Hozier* would appear to uphold all amendments that are reduced to writing anytime before the vesting of participant rights, again regardless of whether the participants have been notified or are informed of the change. Indeed, since ERISA does not require disclosure of material amendments until 210 days after the end of the plan year in which the amendment was adopted, 29 U.S.C. § 1024(b)(1), there will necessarily be cases in which amendments to plans are made and rights under those plans vest before the plan administrator is required to have notified the participants of the change.

However, the apparent inconsistencies of the rule can be understood if viewed in context of the administrative scheme that

Appendix C

ERISA requires to be created with regard to each benefit plan. ERISA dictates that plans be established with a formality not unlike that required of legislative acts. Plan documents are to be public, circulated in summary description to participants 29 U.S.C. § 1102(a), filed with the Secretary of Labor, 29 U.S.C. § 1024(a)(1), and made available for participant review, § 1024(b)(2). The rights and obligations of participants under the benefit plans are governed by terms of the documents as interpreted by the courts, *Firestone*, 103 L.Ed.2d at 95. *Hozier* adds to this scheme that documents control until superseded by valid amendments or new enactments. Amendments are valid if they comply with amendment procedures established in the plan, *see* 29 U.S.C. § 1102(b)(3), and are reduced to writing in the form required of the original plan, 29 U.S.C. § 1022(a)(1). The establishment and amendment of benefit plans are also subject to a panoply of reporting and disclosure rules, 29 U.S.C. §§ 1023, 1024., again analogous to the rules that govern the reporting of public acts.

Air Jamaica seeks to apply its amendment retroactively to plaintiff. Under the formal requirements and spirit of *Hozier* this cannot be allowed. Plaintiff had actual notice and in fact expected to receive benefits in accord with the Handbook description. The Handbook was not amended until he was terminated. The original writing and not the amendment must control his case.

III. *Vacation Pay Claim*

In contrast to resolution of plaintiff's severance pay claim, which depended primarily on determining matters of law, plaintiff's vacation pay claim turns entirely on findings of fact. Pennsylvania law requires that an employer pay an employee upon termination the full salary and vacation pay owed under the

employment agreement. *See* 43 P.S. § 260.5. There is no dispute that the employment agreement between plaintiff and defendant required payment for unused vacation days. The only dispute between the parties is over the number of days to which plaintiff was entitled.

Plaintiff offered two pieces of evidence in support of his claim for 26 days pay; his handwritten records, and a letter from management stating that plaintiff was entitled to the vacation pay demanded. Plaintiff admitted that in keeping his records he did not consider Air Jamaica's formula for determining the number of vacation days that could be carried over from one year to the next. Meanwhile, defendant established that the letter was in error, in that it failed to acknowledge that plaintiff was not entitled to a full allotment of vacation days for 1989. Plaintiff did not otherwise impeach defendant's bookkeeping procedure. Given these facts, I find that plaintiff has not carried his burden in establishing an entitlement to any more than the 12 vacation days that the Air Jamaica records showed to be owing. The vacation pay plan will be denied.

An order follows.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED NOVEMBER 2, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 89-6133

ROBERT L. HAMILTON

v.

AIR JAMACA, LTD.

ORDER

AND NOW, on this 1st day of November, 1990, it is hereby ORDERED that a VERDICT is entered in favor of the plaintiff on the count seeking additional severance pay, and in favor of the defendant on the count seeking additional vacation pay.

BY THE COURT:

s/ illegible S. Gawthrop
GAWTHROP, J.

APPENDIX E — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 30, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1933

HAMILTON, ROBERT L.

Appellee

v.

AIR JAMACA, LTD.,

Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH AND HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix E

By the Court,

s/ Walter K. Stapleton
Circuit Judge